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IN THE

Supreme Court of the United States

OCTOBER TERM, 1946

No. 543

FEDERAL POWER COMMISSION, *et al.*,
Petitioners,

v.

ARKANSAS POWER & LIGHT COMPANY,
Respondent.

PETITION FOR REHEARING

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To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Respondent above named respectfully petitions for a rehearing and for further oral argument and an opportunity to file further briefs in this case upon the grounds that it appears from the *per curiam* opinion of this Court entered on March 10, 1947, that counsel for the Respondent failed to make it clear that the question sought to be resolved is not determinable by an administrative agency, thus misleading the Court into an extension of the exhaustion concept to cover a situation in which it has never before been applied and to which it obviously should not be applied, the result having been erroneously to deny to the Respondent company an opportunity to obtain a declaratory judgment resolving the dilemma with which it is faced. Indeed, the application of the exhaustion principle in the circumstances

of this case does violence to fair play. The grounds upon which rehearing is sought are hereinafter set forth.

Introductory Statement

This is neither a bookkeeping nor an accounting proceeding. The sole issue is whether, in the unprecedented circumstances of this case, the District Court should have taken jurisdiction to enter a declaratory judgment answering this question, "Does the Federal Power Commission or the Arkansas Public Service Commission have exclusive regulatory control over the basic and fundamental books of account of the Respondent Company?" Each Commission claims that exclusive regulatory authority and neither Commission can deny that it has both asserted and intends to exercise that authority. Both cannot exercise the authority which each claims and the Company must have present direction in the keeping of its fundamental books of account from either one authority or the other.

The Company has repeatedly asserted its willingness to keep two differing sets of books (one of which, however, would of necessity be composed of accounts which are auxiliary and supplementary in nature) in obedience to the commands of the two Commissions, but this will satisfy neither Commission, since *each* demands that the Company's *basic and fundamental books of account* be kept in the manner prescribed by *it*.

The State Commission's position is stated in its order of June 24, 1944, in which it found that it had had jurisdiction "to prescribe the manner in which the Respondent keeps its corporate books, accounts and records, and that the books, records and accounts so prescribed * * * shall be the official corporate accounts and records of the Company". The State Commission added that its jurisdiction

over the Company and its electric and other operations was "complete and comprehensive and [that this Commission] is the only regulatory authority having such all-inclusive jurisdiction" (Pet. Br., p. 54). The State Commission's position is also shown by its resistance to the Federal Commission's claims during the course of the instant litigation.

That the Federal Commission is not satisfied with supplementary or auxiliary records is demonstrated by the fact that it has thus far ignored the Company's offer (which offer still stands) to maintain appropriate supplemental records (rather than its basic and fundamental corporate accounts) in accordance with the requirements of that Commission. It will also be remembered that when, upon oral argument, counsel for the Federal Commission was asked whether Section 301(a) of the Federal Power Act "would enable [the Federal Commission] to supersede the state order as to particular entries", counsel for the Federal Power Commission declined to answer the question squarely and refused to take any position with respect to the issue which the question raised. The Federal Commission's position with respect to this issue is, as a matter of fact, definitively set forth in its Opinion No. 138, *In the Matter of Northern States Power Company*, 64 PUR (NS) 257 (1946). In that case, the question arose whether the Federal Power Commission's requirements controlled "the fundamental or basic corporate books of account of a public utility or licensee". In passing upon this question, the Federal Commission stated again, quoting an earlier and consistently maintained opinion, that there could be no doubt about its authority to require companies subject to its jurisdiction "to keep general corporate and other fundamental accounts and records" covering their "entire utility business" in accordance with *its* system of accounts; that while public utilities and licensees might keep "such other supplementary and memorandum accounts" as might be necessary or appropriate, this could be done only to the extent that "the

integrity of our [the Federal Commission's] uniform system * * * is not impaired." The Northern States company was accordingly required to reflect the entries prescribed by the Commission's order "on its fundamental corporate books of account", and the Commission stated that it would consider any failure to do so a violation of its order.

In view of the foregoing, it is idle to suppose that the Federal Commission will ever be satisfied with supplemental or auxiliary records. Rather, it is too clear for argument that the Federal Commission will insist that *its* requirements control the entries to be made in the Company's basic and fundamental books of account. Further, in view of the theories first announced *In the Matters of St. Croix Falls Minnesota Improvement Company* and *St. Croix Falls Wisconsin Improvement Company*, 43 PUR (NS) 1, 11 (1942), followed *In the Matter of the California Oregon Power Company*, 47 PUR (NS) 194, 195 (1943), and adhered to *In the Matter of The Montana Power Company*, 57 PUR (NS) 193, 226 (1945), it is equally idle to suppose that the Federal Commission will not require the Company to make entries in its fundamental and basic accounting records clearly and directly at variance with the requirements of the State Commission now being followed by the Company. The State Commission, relying on the proviso clause of Section 301(a) of the Federal Power Act, is equally insistent that the Federal Commission has no power to prescribe the entries to be made in the Company's basic and fundamental corporate books of accounts and that the State requirements are controlling.

In view of the foregoing, the conflicting claims of the two Commissions can only be settled by a definitive interpretation of Section 301(a) of the Federal Power Act. The Company sought to obtain such an interpretation by filing a complaint in the District Court of the United States for the District of Columbia seeking a declaratory judgment: (a)

that the Federal Commission does not have the exclusive power asserted by it over the Company's basic and fundamental corporate books of account; (b) that the exclusive power to regulate such accounts is vested in the State Commission; or (c) that, in the event it should be determined that the Federal Commission has the power claimed by it, the State Commission does not have the power which it has claimed and exercised over such accounts. The Federal Commission moved to dismiss the complaint, and the District Court's action in granting such motion, while reversed by the United States Court of Appeals for the District of Columbia in a carefully reasoned opinion which presents what we believe to be the correct view of this case with great cogency and persuasiveness, ultimately was upheld by this Court in a *per curiam* opinion entered March 10, 1947.

We have not yet reached the merits of the case. The question which was presented to this Court for decision was not which of the two Commissions has the power they both claim but whether, in a suit for a declaratory judgment, the District Court should have taken jurisdiction to construe the statute and thus pass upon the Commissions' conflicting contentions. The District Court's refusal to do so was upheld by this Court on the ground that the Company "has failed to exhaust its administrative remedies", citing *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41 and *Macauley* v. *Waterman S.S. Corp.*, 327 U.S. 540.

It is respectfully submitted that the *Myers* and *Macauley* cases are not applicable here, that to apply the exhaustion principle under the facts and circumstances of this case represents an unwarranted extension of that principle, and that this Court accordingly should have sustained the opinion of the Court of Appeals.

The Exhaustion Principle Should Not Be Applied Under The Facts and Circumstances of this Case.

The Federal Commission is without power to pass upon the issues raised by the Company's complaint.

Questions arising in the routine administration of the Federal Power Act, for example, whether a public utility may change its rates for the transmission and sale of electric energy in interstate commerce, must of course be passed upon in the first instance by the Federal Power Commission. And its determination of such questions may be reviewed only in the manner provided by Section 313(b) of the Act, that is, by appeal to an appropriate Circuit Court of Appeals or to the Court of Appeals for the District of Columbia. Further, where the Federal Power Commission must make an initial determination as to its jurisdiction in order to decide whether it may exercise its *admitted powers* over a given subject matter (for example, whether the waters upon which a project is to be constructed are "navigable waters of the United States") the same principle clearly should be applied. This latter situation is essentially that presented by the *Myers* and *Macauley* cases. But the question here involved is not merely one arising in the routine administration of the Federal Power Act, nor is it merely a question of "coverage". It has to do with whether, in view of the action of the State Commission, the Federal Power Act may be construed to give the Federal Commission *exclusive* power over the subject matter in question, which power, if it exists, *will cause the Federal Commission to supersede the State Commission and oust it from jurisdiction over the same subject matter.* The Company earnestly submits that the decision of this question is beyond either the express or the implied power of the Federal Power Commission, an administrative agency, and hence is not the type of question which must be decided by

the Federal Commission in the first instance, subject only to review by an appropriate court under Section 313(b) of the Federal Power Act. In short, as the opinion of the court below clearly discloses, the question involved is beyond the administrative-procedure-plus-review framework of the Act itself, as well as beyond the scope of the doctrine of prior resort and the doctrine of exhaustion of administrative remedies. As was said by the court below in its discussion of the *Macauley* case:

> "In *Macauley* v. *Waterman Steamship Corporation*, decided by the Supreme Court March 25, 1946, it was held that the Tax Court, an administrative body charged by the Renegotiation Act with determining certain factual questions thereunder, may construe the Act by deciding whether it applies to a given situation. The appellees suggest, therefore, that they have the same right with respect to the Federal Power Act. This argument overlooks the fundamental fact that something more is at stake than merely to gauge the sweep of the federal statute. For it is one thing for a federal administrative agency to rule as to the coverage of its own act when that act stands alone. It is quite another for the agency to decide whether its organic act overrides the statute of a different sovereignty which already has been applied by the state authorities to the situation which the agency desires to control by applying the federal act. That is a task for the courts. We do not understand the Macauley case as extending to a federal agency the unprecedented power of exercising such a clearly judicial function."

The decision of this Court in *First Iowa Hydro-Electric Cooperative* v. *Federal Power Commission*, No. 603, October Term, 1945, decided April 29, 1946, does not militate against this conclusion. In that case, the Federal Power Commission had dismissed an application for a license to construct a project on navigable waters of the United States on the ground that the applicant had not submitted evidence under Section 9(a) of the Act of compliance with the requirements

of a state statute. Since this Court felt that the Federal Power Act gave to the Federal Power Commission the power to issue a federal license completely aside from and without regard to the operation of conflicting state statutes, it was held that the application for a federal license should not have been dismissed for failure to comply with such state statutes. But it was *this Court,* not the *Commission,* which held that the licensing provisions of the Federal Power Act superseded conflicting state statues dealing with the same subject matter. Hence the *First Iowa* opinion is not a holding that the Federal Power Commission has power to decide that other and different sections of the Act supersede state statutes, with the result that state agencies are ousted from jurisdiction over matters which they assert were left to them by the Congress.

For the reasons stated, the decision of this Court in this case goes beyond the principles announced in the *Myers* and *Macauley* cases and extends the exhaustion concept to a situation to which it has never before been applied and to which, in view of the considerations set forth above, it obviously should not be applied. It is, therefore, respectfully prayed that further consideration be given to this question upon rehearing.

Even if it be said that the Federal Commission has power to decide the questions raised by the Company's complaint, it does not follow that it has the exclusive right to decide such questions, or that the District Court, in a suit for a declaratory judgment, should not have taken jurisdiction to decide the questions presented.

Unlike the statutes involved in the *Myers* and *Macauley* cases, the Federal Power Act does not give to the Federal Power Commission the exclusive right to decide in the first instance all questions arising during the course of the administration of such Federal Power Act. Hence, the District Court was not required by statute to direct the Com-

pany to resort to the Federal Commission for a determination of the questions raised by its complaint prior to seeking relief in the courts. And, since the issues raised by the Company's complaint are not issues involving questions of fact or discretion in technical matters, requiring for their solution knowledge commonly found only in a body of experts, but are purely legal questions not within the peculiar competence of an administrative agency, there is no reason here, independent of statute, why the futile step of presenting the question to the administrative agency should be insisted upon. Further, this case does not present the more or less orthodox situation presented by the *Myers* and *Macauley* cases in which the desirability of maintaining orderly procedure outweighs other considerations and it is proper to allocate earlier stages of a given proceeding to the administrative agency concerned and later stages of that proceeding to a court. Here the issue involved is a proper allocation of power not between *court and commission* but between *commission and commission*, with the Company left in an impossible position by reason of the conflicting claims of the two administrative agencies. Hence, in this case, asserted considerations of orderly administrative procedure should give way and the District Court should have taken jurisdiction so that the serious dilemma in which the Company finds itself may be resolved.

As we have already stated, the Federal Commission has prejudged the question about to be referred to it (if this Court's *per curiam* opinion is not reconsidered) as clearly and definitively as such a question could be prejudged. Perhaps the Federal Commission is correct and we are not assailing that Commission when we say that it has prejudged the question at issue. We are merely asserting as vigorously as possible that it *could be wrong*. Certainly the State Commission thinks that the Federal Commission is wrong and that *it* is right. And, in the circumstances,

neither Commission should be permitted initially, at least in the absence of any statutory requirement, to pass upon its own powers. Commission is arrayed against Commission in this case, each with its announced prejudgments and preconceptions, and to permit either one Commission or the other to determine whether it has the power which the other Commission asserts patently does violence to elemental concepts of fair play.

Because of the peculiar facts and circumstances of this case, a holding by this Court that the issues raised by the Company's complaint may be decided at this time by the District Court, without awaiting further action on the part of the Federal Commission, would not have broad significance as a precedent. So to hold would not mean that federal administrative agencies would be subjected to unreasonable delays in the routine administration of their respective acts, nor would it even mean that every challenge to the jurisdiction of such agencies could be taken to a court for determination. It would simply establish that where conflicting claims to jurisdiction are asserted by federal and state agencies under circumstances similar to those existing in this case, and where, if the federal agency's claim is sustained, the federal commission's powers would supersede and override the asserted state powers, the conflicting claims may be settled by a court in the first instance, without the necessity for permitting the federal agency initially to determine that it has the power which the state claims. Thus, to uphold the Company's contentions will not impair the integrity of the administrative process or interfere with effective regulation by federal administrative agencies. Nor will a decision sustaining the Company's position run counter to the considerations of policy upon which the exhaustion doctrine rests.

Conclusion

It is submitted that the decision of the Court in this case goes beyond the *Myers* and *Macauley* cases and applies the exhaustion concept to a situation to which it has never before been applied and to which it obviously should not be applied, and that all considerations bearing upon the desirability of so extending that concept should be clearly appreciated and carefully weighed before such concept is broadened to cover a situation such as that presented here. Accordingly, for the foregoing reasons and for other reasons appearing in the Company's brief, it is respectfully urged that a rehearing be granted in this matter.

Respectfully submitted

P. A. Lasley

A. J. G. Priest

Counsel for Respondent.

Certificate of Counsel

I, A. J. G. Priest, of Two Rector Street, New York, New York, an attorney regularly admitted to practice before this Court and an attorney and of counsel for the above-named respondent, do hereby certify that in my opinion the foregoing petition for rehearing is submitted in good faith and not for purposes of delay.

A. J. G. Priest

New York, New York
April 2, 1947.